SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 561.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT,

OCTOBER TERM, A. D. 1914.

No. 2181.

THE UNITED STATES,
Plaintiff in Error,

vs.

THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY,
Defendants in Error.

MR. CHARLES F. CLYNE,
MR. SYLVESTER R. RUSH,
Counsel for Plaintiff in Error,

MR. JOSEPH H. DEFREES,
MR. GEORGE T. BUCKINGHAM,
MR. MARQUIS EATON,
Counsel for Defendants in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held at the United States Court Rooms in the City of Chicago, in said Division of said District on the first Monday of July (it being the sixth day thereof) in the year of our Lord One Thousand Nine Hundred and Fourteen and of the Independence of the United States the One Hundred and Thirty-ninth year. Placita.

Present the Honorable Kenesaw M. Landis, Judge of the District Court of the United States for the Northern District of Illinois, presiding, John J. Bradley, United States Marshal for the said District and T. C. MacMillan, Clerk of said Court.

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ion, filed
2, 1914.

2 The United States
vs.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation. } 10623

Be it remembered that heretofore, to wit, on the 2nd day of January, A. D. 1914, there was filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, in the above entitled cause, an Amended Declaration; same being in the words and figures following, to wit:—

3 In the District Court of the United States of America
For the Northern District of Illinois
Eastern Division.

The United States
vs.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation. } No. 10623.

The United States of America, by James H. Wilkerson, its attorney for the Northern District of Illinois, Eastern Division, by this, its amended declaration filed by leave of court for that purpose first obtained, complains of Thomas C. MacMillan and The Empire State Surety Company, a corporation created and existing under the laws of the State of New York and at all times hereinafter mentioned, admitted and authorized to transact business in the State of Illinois, defendants, of a plea that they render to the plaintiff the sum of twenty thousand dollars ($20,000) which they owe to and unjustly detain from the said plaintiff, whereupon the said plaintiff complains of the said defendants in a plea of debt, for that whereas, the said defendants, heretofore, to wit, on the 27th day of December, A. D. 1905, at Chicago, in the district and division aforesaid, by their certain writing obligatory, commonly called an "official bond," sealed with their seals, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged themselves held and firmly bound unto the United States of America in the penal sum of twenty thousand dollars ($20,000) lawful money of the United States, for the payment of which well and truly to be made the said defendants thereby bound themselves, their heirs, executors and administrators, jointly and severally, which said

writing obligatory was and is subject to a certain condition thereunder written whereby after reciting to the effect following, that whereas, pursuant to law, Thomas C. MacMillan has been appointed Clerk of the District Court of the United States for the Northern District of Illinois, it was provided in and by said condition that if the said Thomas C. MacMillan, by himself and by his deputies, shall faithfully discharge the duties of his office * * * and properly account for all moneys coming into his hands, as required by law, then the said obligation to be void, otherwise to remain in full force and virtue. And which said writing obligatory with the conditions aforesaid thereunder written was then and there received by the said United States of America as the official bond of the said Thomas C. MacMillan as Clerk of the District Court aforesaid, with the said The Empire State Surety Company, as his surety in the premises, and was then and there lodged with the Department of Justice of the said United States of America, which said writing obligatory was then and there approved according to law by said court, as the official bond of the said Thomas C. MacMillan as Clerk of the District Court of the United States for the Northern District of Illinois aforesaid, and thereupon the said Thomas C. MacMillan took upon himself to discharge the duties of his said office, and was then and there the Clerk of the District Court of the United States for the Northern District of Illinois and continued so to be and is now the said Clerk as aforesaid.

Amended declaration, filed Jan. 2, 1914.

Yet, the plaintiff in fact says, that the said Thomas C. MacMillan did not faithfully discharge the duties of his office and properly account for all moneys coming into his hands as Clerk of the said District Court, according to law and according to the conditions of said writing obligatory, but that during the period for which he was so appointed Clerk of the District Court of the United States for the Northern District of Illinois, and during the period between the said 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, during all of which said period the said writing obligatory as aforesaid was and continued to remain in full force and virtue, the said Thomas C. MacMillan, Clerk as aforesaid, wholly negected and failed to truly and faithfully perform all the duties of his said office according to law and to the tenor of said writing obligatory, and said plaintiff here assigns the breaches of the conditions of said bond as follows:

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n. 2, 1914.

First Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, by reason whereof a large sum of money, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) came into the hands of the said Thomas C. MacMillan in his official capacity as said Clerk, and not otherwise, that is to say, that the said moneys, amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on public moneys and moneys entrusted to the said Thomas C. MacMillan in his official capacity, as said Clerk, to wit, (a) moneys paid to the Clerk as fees under the bankruptcy laws of the United States, and (b) moneys paid to the Clerk as his fees and compensation and as his emoluments as Clerk under various statutes of the United States, and (c) moneys deposited with the Clerk by various litigants in said District Court under and by virtue of certain rules of said court, held by said Thomas C. MacMillan and deposited by him as Clerk aforesaid, and the said aggregate was a sum of money collected by the said Thomas C. MacMillan which was paid to him for the use of said moneys collected and held by him as Clerk as aforesaid under the laws of the United States and under authority of the rules and regulations of the Department of Justice, and the same is and was no part of any sum or sums earned by him, the said Thomas
6 C. MacMillan, as such Clerk, but was in fact and is money held by him, the said Thomas C. MacMillan as such Clerk for the use and benefit of the said United States and of said litigants in said District Court, and divers other persons who were and are entitled to receive said moneys from said Thomas C. MacMillan, Clerk as aforesaid.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sum so collected by him as aforesaid and deposit the same with the Treasurer or an Assistant Treasurer of the United States or a designated depository of the United States, in the name and to the credit of said District Court to be held for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, and the said surety on said

bond aforesaid, have wholly failed and refused, either to pay said money to said United States or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States in the name and to the credit of said District Court or to pay the same into any other fund provided by law, for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, in violation of the obligations of said writing obligatory aforesaid, has wrongfully converted said sums of money amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan and by reason of the non-performance by him of his duties in that behalf an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

Amended declaration, filed Jan. 2, 1914.

7 Second Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, by reason whereof a large sum of money, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) came into the hands of the said Thomas C. MacMillan in his official capacity as said Clerk, and not otherwise, that is to say, that the said moneys amounting in the aggregate to three thousand eight hundred sixty-one dollars and five cents ($3,861.05) were derived from payments made to the said Thomas C. MacMillan for and on account of the interest on moneys entrusted to the said Thomas C. MacMillan in his official capacity, to wit, moneys deposited with the said Clerk by various litigants in said District Court under and by virtue of certain rules of said court and held by said Thomas C. MacMillan and deposited by him as Clerk as aforesaid, and said amount was a sum of money collected by the said Thomas C. MacMillan which was paid to him for the use of said moneys collected and held by him as Clerk as aforesaid, under the laws of the United States and under authority of the rules and regulations of the Department of Justice, and the same is and was no part of any sum or sums earned by him, the

Amended declaration, filed Jan. 2, 1914.

said Thomas C. MacMillan as such Clerk but was and is money held by him, the said Thomas C. MacMillan, as such Clerk, for the use and benefit of said litigants in said District Court, who were and are entitled to receive said money from the said Thomas C. MacMillan, Clerk as aforesaid.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sums so collected by him as aforesaid, and deposit the same with the Treasurer or an Assistant Treasurer of the United States, or a designated depository of the United States in the name and to the credit of said District Court to
8 be held for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan and the said surety on said bond, aforesaid, have wholly failed and refused either to pay said money to said United States, or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States, in the name and to the credit of the said District Court, or to pay the same into any other fund provided by law for the use and benefit of the parties entitled thereto, and the said Thomas C. MacMillan, in violation of the obligations of said writing obligatory aforesaid, has wrongfully converted said sums of money amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan and by reason of the non-performance by him of his duties in that behalf, an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

Third Assignment: Heretofore, to wit, during all of the period aforesaid, between the 27th day of December, A. D. 1905, and the 27th day of January, A. D. 1910, said Thomas C. MacMillan was in office as aforesaid, filling and occupying the position of Clerk of the United States District Court as aforesaid, and by reason of his official position aforesaid, there came into the possession of said Thomas C. MacMillan, as Clerk of said District Court, divers large sums of money, amounting in the aggregate to the sum of, to wit, two hundred and fifty thousand dollars ($250,000), which were deposited with him as said Clerk by various litigants in said District

Court under and by virtue of certain rules of said court, and which were held by said Thomas C. MacMillan, as Clerk of said court.

Amended declaration, filed Jan. 2, 1914.

Plaintiff further avers that said sums of money which so came into the possession of said Thomas C. MacMillan as aforesaid, were not and never did become the property of
9 said Thomas C. MacMillan, but were moneys belonging to divers litigants in said court who had deposited the same with said Clerk to secure the payment of court costs, clerk's fees, witness fees and other expenses and to satisfy orders and judgments in litigation pending in said court, and continued to be the property of said litigants in the possession of said Clerk as aforesaid, until they were used for the payment of said court costs, clerk's fees, witness fees and other expenses, and to satisfy orders and judgments in litigation, or were returned by said Clerk to said litigants.

Plaintiff further avers that said Thomas C. MacMillan, Clerk as aforesaid, deposited said sums of money belonging to said litigants and in his possession as Clerk of said Court as aforesaid with divers banks, and collected upon said moneys so deposited the interest thereon amounting to the sum of, to wit, three thousand eight hundred sixty-one dollars and five cents ($3,861.05) and that said interest so collected was at no time, and is not, the property of said Thomas C. MacMillan, and was and is the property of said litigants in said court upon whose money said Thomas C. MacMillan, Clerk as aforesaid, collected said interest.

Plaintiff further avers that thereafter, to wit, on July 15th, 1910, said plaintiff made demand upon the said Thomas C. MacMillan that he, said Thomas C. MacMillan, account for said sums so collected by him as aforesaid, and deposit the same with the Treasurer or an Assistant Treasurer of the United States, or a designated depository of the United States, in the name and to the credit of said District Court to be held for the use and benefit of said parties entitled thereto, and that said Thomas C. MacMillan, and said surety on said bond aforesaid, have wholly failed and refused either to pay said money to said United States, or to deposit the same with the Treasurer or an Assistant Treasurer of said United States, or in a designated depository of the United States, in the name and to the credit of said District Court, or to pay the same into any other fund provided for by law, for the use and benefit of the parties entitled thereto, and that said Thomas C. MacMillan, in violation of the obligations of said

Amended declaration, filed Jan. 2, 1914.

writing obligatory aforesaid, has wrongfully converted
10 said sums of money, amounting in the aggregate to the sum of three thousand eight hundred sixty-one dollars and five cents ($3,861.05) to his own use, and that by reason of said wrongful conduct on the part of said Thomas C. MacMillan, and by reason of the non-performance by him of his duties in that behalf, an action has accrued to the said United States of America to have and recover from the said defendants herein the said sum of twenty thousand dollars ($20,000). Yet the said defendants have not, or either of them, paid said sum, or any part thereof, to the damage of said plaintiff of twenty thousand dollars ($20,000).

And, therefore, it brings suit, etc.

JAMES H. WILKERSON,
United States Attorney,
Attorney for plaintiff.

11 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States vs. Thomas C. MacMillan and The Empire State Surety Company, a corporation. Amended Declaration of Debt. Filed Jan. 2, 1914, at .... o'clock .... M. T. C. MacMillan, Clerk. James H. Wilkerson, U. S. Attorney.

12 And afterwards, to wit, on the 1st day of July, A. D. 1911, there was filed in the Clerk's office of said Court, in the above entitled cause, a Plea of Defendants, same being in the words and figures following, to wit:—

13 UNITED STATES OF AMERICA,

Plea of Defendants, filed July 1,

Northern District of Illinois,

Eastern Division.

United States of America,
—*vs*—
Thomas C. MacMillan *et al.*

PLEA OF DEFENDANTS.

And the defendants, Thomas C. MacMillan, and The Empire State Surety Company, come and say that the plaintiff ought not to have and maintain its aforesaid action against them, the defendants, because they say:—

That there came into the possession and custody of said Thomas C. MacMillan, (hereinafter referred to as "Clerk"), and was deposited by him in various banks, while he was in such custody and possession, certain moneys (in all, hereinafter referred to as the "Aggregate Principal").

That said "aggregate principal" was composed of, and came from sources, respectively, following, and not otherwise, to-wit:—

(a) Moneys paid to the Clerk as Clerk's fee and compensation, under the bankruptcy laws of the United States; and

(b) Moneys paid to the Clerk as his fees, and compensation, and as his emoluments as Clerk, under various other
14 statutes of the United States; and

(c) Moneys deposited with the Clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

That on the average balances of said "aggregate principal" so remaining from day to day on deposit, the Clerk received interest, at the rate of two (2) per cent. said interest so received being the said three thousand eight hundred sixty-one and 05/100 dollars ($3,861.05) mentioned in the declaration, and no other.

That as to the money included in items (a) and (b), and in that portion of item (c) which was, after its deposit, paid to the Clerk as Clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund "d"), the Clerk did on the

of defendants, filed July, 1, 1911.

first day of each January and July, of each year, or within thirty (30) days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and emoluments of his said office as Clerk of said District Court, and included in the same, all of the moneys composing said items (a) and (b), and that portion of item (c) paid to the Clerk as fund "d."

That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire, (and including his own compensation as allowed by law) and was accompanied by vouchers, for, and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year, of all fees and emoluments received, and of all said necessary expenses paid out, which expenses were deducted on said statement from the entire amount of all said fees and emoluments received; that the surplus of money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to-wit: on the same day, paid into the Treasury of the United States, or to the Sub-treasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown, and accounted for and paid, was in each case received by the United States.

That the said interest received by the Clerk in each said semi-annual period earned and accrued as aforesaid, upon said items (a) and (b), and upon that portion of item (c) above mentioned as fund "d" was so earned and accrued before, and not after, the said fees and emoluments composing the said items, had been so included in, and made the subject of, said return, and had formed the basis of the computation and ascertainment of said surplus.

That there was, during all of the time mentioned in the declaration, in full force and effect, certain rules of the said District Court, in words and figures following, to-wit:—

—3—

DEPOSITS.

(1) Upon the commencement of any original suit, and be-

fore the process is issued, the plaintiff shall deposit with
16 the Clerk twenty-five dollars to be applied to the payment
of costs as they shall accrue; and before any transcript in any cause transferred or certified into this court is filed, except by the United States, or some Government officer, the party so removing shall deposit a like sum to be applied in the same manner. Whenever the costs accruing against either party shall equal or exceed the sum so deposited, an additional sum shall, upon demand by the Clerk, be deposited by such party.

Plea of defendants, July, 1,

(3) Upon filing a demurrer, plea, or other appearance in a law case, each defendant appearing separately in person or by counsel, and each group of defendants entering one joint appearance in person or by counsel, shall deposit with the Clerk five dollars to apply on the payment of court costs made by such defendants as they shall accrue. If there are other defendants appearing by separate attorney, a like sum will be deposited by their counsel. Whenever such costs equal or exceed the sum so deposited, an additional sum shall, upon demand by the Clerk, be deposited by such party.

—32—

MONEYS.

The Clerk of this court shall receive any moneys paid to him to be applied on any judgments in this court, and pay out the same to the parties or attorneys of record entitled to receive it upon taking a receipt therefor without further order of the court, and the clerk shall be entitled to one per cent on
all moneys so received and paid out to be accounted for
17 by the Clerk as earnings of his office. In case where
money is paid to the Clerk under special order of court, any party interested may move for an order that the Clerk deposit the same under the direction of the court. On deposits so made the Clerk shall, upon motion of either party and upon order of the court, be required to account for any interest collectible on said fund; but without such order he shall not be required to account for interest.

When any balance of the original deposit made to secure costs remains unexpended, and the time for suing out a writ of error or appeal has expired, such balance shall be paid to the original depositor, or his successor, as soon as practicable.

That said item (c) was composed entirely of money paid

of de-
dants, filed
y. 1, 1911.

to the Clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the Clerk—

To himself as fees or compensation allowed by law; and to the Marshal and other court officers as their respective fees or compensation allowed by law, and to other persons, and for other purposes, connected with litigation, as the same should be from time to time, by the said court directed.

That all of the fees and emoluments earned by the Clerk, and to which he became entitled, to be paid and which he
18 was paid out of said item (c), were by him included in, and specified in his said respective semi-annual returns and reports, as aforesaid.

That the portion of the money composing said item (c), which was composed of said fees and compensation of the Marshal, and other court officers, and said sums directed by the court to be paid to others, was all, by the Clerk, paid to those court officers entitled to the same, as, and when the same was by such officers earned, or was paid to such other persons when and as the court directed the same to be paid to them, as the case might be; said portion being herein called and referred to as fund "e."

That the money composing the residue of said item (c), other than fund "d" and fund "e," was by the Clerk paid out to the persons depositing the same or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

That of the said sum of money composing item (c), that portion earned by, and paid to, the Clerk as fees and emoluments earned by him as Clerk (being fund "d"), was in each case included in, and settled for, in the respective semi-annual returns as aforesaid.

And this the defendants are ready to verify.

Wherefore defendants pray judgment, etc.

DEFREES, BUCKINGHAM, RITTER, CAMPBELL & EATON,
Attorney for Defendants.

19 Endorsed: 10623. District Court of U. S. United States of America vs. Thomas C. MacMillan, and The Empire State Surety Company. Plea of Defendants. Filed July 1, 1911. T. C. MacMillan, Clerk.

20 And afterwards, to wit, on the 14th day of July, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Plea; same being in the words and figures following, to wit:— Demurrer to plea, filed July 14.

21 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Co. } No. 10623.

DEMURRER TO PLEA.

And the said plaintiff says that the said plea by the said defendants in manner and form as pleaded and the matters therein contained and set forth are not sufficient in law to bar the said plaintiff of its aforesaid action against them and that the said plaintiff is not bound by law to answer the same and this the plaintiff is ready to verify.

Wherefore, judgment is prayed, etc. as aforesaid, etc.

EDWIN W. SIMS,
United States Attorney,
Attorney for Plaintiff.

22 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. Thomas C. MacMillan, and Empire State Surety Company. Demurrer to Plea. Filed July 14, 1911. T. C. MacMillan, Clerk. Edwin W. Sims, U. S. Attorney.

23 And afterwards, to wit, on the 14th day of July, A. D. 1914; the following order was had and entered of record in said cause, to wit:—

r of July 1914.

24 United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company. } No. 10623.

Come the parties by their attorneys and on motion It is Ordered by the Court that the plea of the defendants to the declaration stand as the plea to the amended declaration and that the plaintiff's demurrer to the plea of the defendants to the declaration stand as the demurrer to the plea to the amended declaration and the Court having heard the arguments of counsel on said demurrer and being fully advised in the premises overrules the same and gives the plaintiff until August 3, 1914, to elect to stand on its demurrer or to reply to the defendants' plea.

25 And afterwards, to wit, on the 31st day of July, A. D. 1914, the following order was had and entered of record in said cause, to wit:—

United States of America
vs.
Thomas C. MacMillan, and The Empire State Surety Company, a corporation. } #10623

Come the parties by their attorneys and the Plaintiff by United States Attorney elects to stand by its demurrer. Whereupon, it is Ordered by the Court that the Plaintiff take nothing by its amended declaration and that the Defendants go hence without day; to which judgment of the Court, the Plaintiff by its attorney duly excepts, and is granted sixty days' time within which to file its Bill of Exceptions.

26 And afterwards, to wit, on the 27th day of August, A. D. 1914, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Writ of Error; same being in the words and figures following, to wit:—

27 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

Petition for writ of error filed Aug. 1914.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. } No. 10623.

PETITION.

To the Honorable Ferdinand A. Geiger:

Your petitioner, United States of America, by James H. Wilkerson, Attorney for the Northern District of Illinois, respectfully represents and shows that on the fourteenth day of July, A. D. 1914, at the regular July term of said District Court of the United States of America for the Northern District of Illinois, Eastern Division thereof, a final order was entered in said court overruling the demurrer of the plaintiff, United States of America, to a plea filed by the defendants herein, and on the thirty-first day of July, A. D. 1914, said court entered a judgment for the defendants in accordance with the order sustaining the demurrer.

Your petitioner further states that he is advised and believes that the court erred in overruling said demurrer and in entering judgment for the defendants herein;

Wherefore, your petitioner prays that it be allowed a writ of error and that the record in said case be ordered to be certified to the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit, as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected and full and separate justice done in the premises.

J. H. WILKERSON,
United States Attorney.

28 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division, United States of America vs. Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. Petition. Filed Aug. 27, 1914, at 2 o'clock P. M. T. C. MacMillan, Clerk.

nment of rs, filed t. 27, 1914.

29 And afterwards, to wit, on the 27th day of August, A. D. 1914, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors; same being in the words and figures following, to wit:—

30 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

United States of America
v.
Thomas C. MacMillan, and The Empire State Surety Company, a Corporation } No. 10623.

ASSIGNMENT OF ERRORS.

Now comes the United States of America, by its attorney, James H. Wilkerson, Attorney for the Northern District of Illinois, and says there is manifest error on the face of the record in the above entitled cause, in this:

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in overruling the demurrer to the plea to the amended declaration herein.
2. The court erred in not sustaining the demurrer to the plea to the amended declaration herein.
3. The court erred in holding that the plea herein stated a good defense to the amended declaration herein.
4. The court erred in entering judgment for the defendants.

J. H. WILKERSON,
United States Attorney.

31 Endorsed: No. 10623. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America, vs. Thomas C. MacMillan, and The Empire State Surety Company, a Corporation. Assignment of Errors. Filed Aug. 27, 1914, at 2 o'clock P. M. T. C. MacMillan, Clerk.

32 And afterwards, to wit, on the 27th day of August A. D. 1914, the following order was had and entered of record in said cause, to wit:—

The United States
vs.
T. C. MacMillan, *et al.* } No. 10623

Order of A
27, 1914.

Comes the United States by James H. Wilkerson, Esq., United States Attorney and on his motion supported by petition for a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit accompanied by an assignment of errors, It is Ordered that a writ of error be granted as prayed in said petition.

33 And afterwards, to wit, on the 6th day of October, A. D. 1914, there was filed in the Clerk's Office of said Court in the above entitled cause, an order, enlarging time within which to file record; same being in the words and figures following, to wit:

Tuesday, October 6, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

United States of America,
Plaintiff in Error,
vs.
Thomas C. MacMillan and The Empire State Surety Co.
Defendants in Error. } District Court No. 10623.

On motion of Charles F. Clyne, United States Attorney, it is hereby ordered that the time within which plaintiff in error may file the record in this Court shall be enlarged up to and including October 20, 1914.

Endorsed: United States Circuit Court of Appeals, For the Seventh Circuit. Filed Oct. 6, 1914, at ..... o'clock ..... M. T. C. MacMillan, Clerk.

Certificate of Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

34 I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in the above entitled cause, prepared in accordance with praecipe attached hereto, as same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, in said District, this 13th day of October, A. D. 1914.

T. C. MACMILLAN
Clerk.

(Seal)

Citation.

35 United States of America, } ss.

The President of the United States, To Thomas C. MacMillan and The Empire State Surety Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The United States is plaintiff in error and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ferdinand A. Geiger, Judge of the District Court of the United States, this 27th day of August, in the year of our Lord one thousand nine hundred and fourteen.

F. A. GEIGER,
Dist. Judge.

(Endorsed) No. 10,623 District Court of the United States, Northern District of Illinois, Eastern Division. Citation. Returnable Sept. 27, 1914. T. C. MacMillan, Clerk.

36 United States of America, } ss.

Writ of error.

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States plaintiff and Thomas C. MacMillan and The Empire State Surety Company defendants a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of August, in the year of our Lord one thousand nine hundred and fourteen.

(Seal) T. C. MacMillan
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by

.....
Judge.

(Seal)

Return to writ of error.

Northern District of Illinois, } ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 13th day of October, A. D. 1914.

T. C. MacMillan
Clerk United States District Court,
Northern District of Illinois.

(Endorsed) 10,623 United States Circuit Court of Appeals Seventh Circuit The United States Plaintiff in Error, vs. T. C. MacMillan et al. Defendant in Error. Writ of Error Copy depos ted for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

37 UNITED STATES OF AMERICA

Praecipe for record, filed Sept. 14, 1914.

Northern District of Illinois

Eastern Division.

In the District Court Thereof } ss.
September Term, A. D. 1914 }

United States of America
v.
Thomas C. MacMillan and The Empire State Surety Company, a Corporation } No 10623.

PRAECIPE FOR RECORD ON WRIT OF ERROR.

To T. C. MacMillan, Esq., Clerk of the District Court of the United States, For the Northern District of Illinois.

Please prepare the record in the above entitled cause for the purpose of filing the same as a writ of error in the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit, which shall include the following:

Amended declaration filed January 2, 1914; plea of defendants; demurrer to plea; order of July 14, 1914; and order of July 31, 1914; Petition for Writ of Error, filed Aug. 27, 1914; and Assignments of Error, filed Aug. 27, 1914; Order of Aug. 27, 1914.

CHARLES F. CLYNE
Attorney for Plaintiff.

Dated Chicago, September 12th, 1914.

Received a copy of the foregoing praecipe this 12th day of September, A. D. 1914.

DEFREES, BUCKINGHAM & EATON
Attorneys for Defendants.

(Endorsed) No. 10623 In the District Court of the United States for the Northern District of Illinois Eastern Division. United States of America vs. Thomas C. MacMillan and The Empire State Surety Company, a corporation. Praecipe for Record on Writ of Error. Filed Sep 14 1914 at 2 o'clock P. M. By T. C. MacMillan, Clerk Charles F. Clyne, United States Attorney.

22 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 21, inclusive, contain a true copy of the printed record, filed February 8, 1918, on which this cause was argued, heard and determined in the case of the United States vs. Thomas C. MacMillan and The Empire State Surety Company, No. 2181, October term, 1914, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this eighth day of July, A. D. 1918.

[SEAL.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

23 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room in the city of Chicago in said Seventh Circuit on the second day of October, 1917, of the October term, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second year.

And afterwards, to wit, on the ninth day of April, 1918, in the October term aforesaid, the following proceedings were had and entered of record, to wit:

TUESDAY, April 9, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Christian C. Kohlsaat, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. Ferdinand A. Geiger, district judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before: Hon. Christian C. Kohlsaat, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. Ferdinand A. Geiger, district judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN ET AL.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on April 16, 1918.

24 And afterwards, to wit, on the sixteenth day of April, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record to wit:

TUESDAY, April 16, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Christian C. Kohlsaat, circuit judge; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before: Hon. Francis E. Baker, circuit judge; Hon. Christian C. Kohlsaat, circuit judge; Hon. Evan A. Evans, circuit judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN AND THE EMPIRE SURETY COMPANY.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Joseph B. Fleming, counsel for plaintiff in error, and by Mr. George T. Buckingham, counsel for defendants in error.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division,
25 in this cause be, and the same is hereby, affirmed on the authority of the opinion rendered by this court in cause No. 2180, The United States vs. Thomas C. MacMillan et al.

And afterwards, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain petition for writ or error, which said petition for writ of error is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

October term, A. D. 1917.

No. 2181.

The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error.

Petition for writ of error from the United States Supreme Court to the Circuit Court of Appeals for the Seventh Circuit.

To the honorable circuit judges, Seventh Circuit:

Your petitioner, the United States of America, by Charles F. Clyne, United States attorney, and Sylvester R. Rush, special assistant to the Attorney General, being duly authorized by the Attorney General of the United States, respectfully represent and show that on the 16th day of April, A. D. 1918, at the regular October term of the said Circuit Court of Appeals of the United States of

America for the Seventh Circuit, a final order and judgment
26 was entered in said court affirming the judgment of the United States District Court for the Northern District of Illinois, overruling the demurrer of the plaintiff in error, the United States of America, to a plea filed to plaintiff's petition by the defendants in error herein, and on the 31st day of July, A. D. 1914, said District Court entered a judgment for the defendants in accordance with the order overruling said demurrer.

Your petitioner further states that it is advised and believes that the said Court of Appeals erred in affirming the said District Court in overruling said demurrer and in entering judgment for the defendants in error herein, and that the matter in controversy in said suit exceeds one thousand ($1,000.00) dollars, besides costs, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error;

Wherefore, your petitioner and plaintiff in error respectfully prays that a writ of error be allowed the petitioner in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record of the proceedings in said cause, with all things concerning the same, duly authenticated to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed and if error be found, corrected according to the laws and practice of the United States.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

27 UNITED STATES OF AMERICA,
Eastern Division of the Northern District of Illinois, ss:

Upon reading and filing the foregoing petition and the assignment of errors herein referred to it is ordered that the petition be and the same hereby is allowed; that a writ of error as therein prayed be issued by the clerk of the United States Circuit Court of Appeals for the Seventh Circuit, under the seal of said court. It is further ordered that the foregoing allowance of said writ of error shall operate as a supersedas in said cause, until the final disposition of the same by the Supreme Court of the United States.

Dated at Chicago, Illinois, this 6th day of July, A. D. 1918.

FRANCIS E. BAKER,
Judge, Circuit Court of Appeals,
Seventh Circuit.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office

of the clerk of this court a certain assignment of errors, which said assignment of errors is in the words and figures following, to wit:

In the United States Circuit Court of Appeals, for the Seventh Circuit.

October Term, A. D. 1917.

No. 2181.

The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error.

28 *Assignment of errors on writ of error from the Supreme Court of the United States to the Circuit Court of Appeals for the Seventth Circuit.*

Now comes the United States of America, and by its attorneys, Charles F. Clyne, United States attorney for the Northern District of Illinois, and Sylvester R. Rush, special assistant to the Attorney General, and in connection with its said petition for a writ of error says that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error, and this plaintiff in error here assigns the following errors, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, in favor of the said defendant in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and in not remanding said cause to the said court directing judgment to be entered for plaintiff in error, or for trial.

Third. Said Circuit Court of Appeals erred in not sustaining plaintiff's first, second, third, and fourth assignments of error.

Fourth. Said Circuit Court of Appeals erred in sustaining the District Court of the United States for the Northern District
29 of Illinois, Eastern Division, in overruling the demurrer to the plea of the amended declaration herein.

Fifth. Said Circuit Court of Appeals erred in affirming the order and judgment of the said District Court in refusing to sustain the demurrer to the plea to the amended declaration herein.

Sixth. Said Circuit Court of Appeals erred in affirming the judgment of the said District Court in holding that the plea herein stated a good defense to the amended declaration herein.

Seventh. Said Circuit Court of Appeals erred in failing to take judicial notice that the said Thomas C. MacMillan, defendant in error, clerk of the Northern District of Illinois, Eastern Division, under act of Congress of July 31, 1894 (28 Statutes at Large, 204), was a salaried officer whose compensation was by law fixed at $3000.00 per annum, and the said clerk was therefore prohibited by section 1765 of the Revised Statutes of the United States from receiving and retaining any part of the said three thousand eight hundred sixty-one dollars and five cents ($3,861.05), herein sued for, as additional compensation.

Eighth. Said Circuit Court of Appeals erred in refusing to hold that the moneys included in the said clerk's semi-annual return on which said interest was collected and retained by the said clerk prior to being so included, did not belong to the said clerk and that he must account for the interest received thereon to the United States.

Ninth. Said Circuit Court of Appeals erred in not holding that all moneys entrusted to the said clerk by litigants and bankrupts, not included in his semi-annual emolument returns, are trust funds for which the said clerk as bailee or trustee under his said bond must account to the United States, including said moneys received thereon as interest and appropriated to his own use.

Tenth. Said Circuit Court of Appeals erred in entering judgment herein for defendants in error.

Wherefore, the said plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the said plaintiff in error, said judgment of the said United States Circuit Court of Appeals be reversed, annulled and vacated and that said cause be remanded to the United States Circuit Court of Appeals, Seventh Circuit, Northern District of Illinois, with instruction to enter judgment for plaintiff in error or for such further proceedings in said cause as may be determined upon by this honorable court to the end that justice may be done in the premises.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

SATURDAY, *July 6, 1918.*

Court met pursuant to adjournment.

31 Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Edward M. Holloway, clerk.

Before: Hon. Francis E. Baker, circuit judge.

THE UNITED STATES *vs.* THOMAS C. MACMILLAN ET AL.	2181. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the United States, plaintiff in error, by its counsel, Mr. Charles F. Clyne, United States attorney for the Northern District of Illinois, and Mr. Sylvester R. Rush, Special Assistant to the Attorney General, and presents an assignment of errors and a petition for a writ of error to remove this cause to the Supreme Court of the United States, and on consideration whereof, it is now here ordered that said petition for a writ of error be, and the same is hereby allowed; and it is ordered that a writ of error issue as prayed for in the said petition.

And afterwards, on the same day, to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain præcipe for record, which said præcipe is in the words and figures following, to wit:

32 In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY Company, defendants in error.	No. 2181.

Præcipe for record.

The clerk of this court is hereby directed to prepare a certified transcript of the record in the above entitled cause for the use of the United States Supreme Court, by including therein the following:

1. Copy of printed record filed herein.
2. All orders, judgments or decrees entered of record in said cause in the Court of Appeals.
3. Copy of printed opinion of Court of Appeals in case No. 2180, the United States, Plaintiff in Error, vs. Thomas C. MacMillan et al., defendants in error.
4. Copy of the opinion of the District Court herein.
5. Petition for writ of error.
6. Assignments of error.

7. Order allowing writ of error.
8. Writ of error.
9. Citation in error and acknowledgment of service of copy.
10. Præcipe for transcript and acknowledgment of service of copy.
11. Certificate of clerk to trascript of record.

33 Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

And afterwards, on the same day to wit, on the sixth day of July, 1918, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain notice of filing præcipe, which said notice is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Notice of filing præcipe.

To JOSEPH H. DEFREES, GEORGE T. BUCKINGHAM, and MARQUIS EATON,
Attorneys for the defendants in Error:

Please take notice that on the 6th day of July, A. D. 1918, the undersigned filed with the clerk of this court a præcipe for the record to be transmitted to the Supreme Court of the United States on writ of error sued out in the above entitled cause, a copy of which præcipe is herewith served on you.

34 Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

Service of the within notice and copy of præcipe is hereby accepted this 6th day of July, A. D. 1918.

JOSEPH H. DEFREES, GEORGE T. BUCKINGHAM &
MARQUIS EATON,
Attorneys for Defendants in Error.
By DONALD DEFREES,
Attorneys for Thomas C. MacMillan.

In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Præcipe for record.

The clerk of this court is hereby directed to prepare a certified transcript of the record in the above entitled cause for the use of the United States Supreme Court, by including therein the following:

1. Copy of printed record filed herein.
2. All orders, judgments or decrees entered of record in said cause in the Court of Appeals.
3. Copy of printed opinion of Court of Appeals in case No. 2180, the United States, plaintiff in error, vs. Thomas C. MacMillan, et al., defendants in error.

35 4. Copy of the opinion of the District Court herein.
5. Petition for writ of error.
6. Assignments of error.
7. Order allowing writ of error.
8. Writ of error.
9. Citation in error and acknowledgment of service of copy.
10. Præcipe for transcript and acknowledgment of service of copy.
11. Certificate of clerk to transcript of record.

Dated this 6th day of July, A. D. 1918.

CHARLES F. CLYNE,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney General.

(Endorsed:) Filed July 6, 1918. Edward M. Holloway, clerk.

36 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 13, inclusive, contain a true copy of the proceedings had and papers filed, as called for in the præcipe for record filed, except the writ of error and the citation, the originals of which are hereto attached; and the opinion of this court in cause No. 2180, The United States vs. Thomas C. MacMillan, et al., and the opinion of the District Court of the United States for the Northern District of Illinois, in this cause, copies of which are

hereto attached in the case of The United States vs. Thomas C. MacMillan and The Empire State Surety Company, No. 2181, October term, 1917, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this eighth day of July, A. D. 1918.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

37 In The United States Circuit Court of Appeals, for the Seventh Circuit.

October term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN and THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181

Writ of Error, United States Supreme Court to United States Circuit Court of Appeals, Seventh Circuit.

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals, Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, Seventh Circuit of the United States, before you or some of you at the October term, 1917, thereof, between the United States of America, plaintiff in error, and Thomas C. MacMillan and The Empire State Surety Company, defendants in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
38 so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of July, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk, United States Circuit Court of Appeals, Seventh Circuit.

Allowed by Francis E. Baker, Circuit Judge, United States Circuit Court of Appeals, Seventh Circuit.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, ss.

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this eighth day of July, A. D. 1918.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Endorsed on cover:) In the United States Circuit Court of Appeals for the Seventh Circuit. The United States, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company, defendants in error. No. 2181. Writ of error, United States Supreme Court to United States Circuit Court of Appeals, Seventh Circuit. Filed July 6, 1918. Edward M. Holloway, clerk.

40 In the United States Circuit Court of Appeals for the Seventh Circuit.

October term, A. D. 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THOMAS C. MACMILLAN AND THE EMPIRE STATE SURETY COMPANY, defendants in error. } No. 2181.

Citation in error.

UNITED STATES OF AMERICA, *ss:*

To Thomas C. MacMillan and The Empire State Surety Company, defendants, in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of Appeals of the United States, Seventh Circuit, Chicago, Illinois, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis E. Baker, judge of the Circuit Court of Appeals of the United States for the Seventh Circuit, this 6th day of July, in the year of our Lord one thousand nine hundred and eighteen.

FRANCIS E. BAKER,
Circuit Judge.

41 Service of the foregoing citation is hereby acknowledged this 6th day of July, A. D. 1918.

JOSEPH H. DEFREES,
GEORGE T. BUCKINGHAM,
and MARQUIS EATON,
Attorneys for
By DONALD DEFREES,
THOMAS C. MACMILLAN.

42 (Endorsed on cover:) In the United States Circuit Court of Appeals for the Seventh Circuit. The United States, plaintiff in error, vs. Thomas C. MacMillan et al., defendants in error. No. 2181. Citation in error. Filed July 6, 1918. Edward M. Holloway, clerk.

43 In the United States Circuit Court of Appeals for the Seventh Circuit.

October term and session, 1917. No. 2180.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* THOMAS C. MACMILLAN, BERNARD A. Eckhart, and D. A. Cameron, defendants in error.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before BAKER, KOHLSAAT and ALSCHULER, *cir. JJ.*:
Per Curiam.

Suit was brought by the United States on the official bond of Thomas C. MacMillan, clerk of the United States District Court for the Northern District of Illinois, the alleged breach of the bond being that for the period between January 27, 1910, and August 1, 1910, he received and did not turn over to the Government interest to the amount of $368.86 on public monies which came to him as such clerk, such monies being (a) fees paid to him under the bankruptcy laws of the United States; (b) monies paid to him as his emoluments and fees under various statutes of the United States, and (c) monies paid to him as clerk by various litigants, under various statutes and under the rules of the Department of Justice. To the

plea of the defendant, the Government interposed a demurrer, which the court overruled, and the Government electing to stand by its demurrer, judgment was entered for defendant. The issues are more fully stated in the opinion of Judge Geiger in the district court, upon the overruling of the demurrer. 209 Fed. 266.

44 We are in accord with the views expressed in that opinion, and with the conclusion reached by the district court. Since the oral argument in this court, our attention has been directed to an opinion of the Comptroller of the Treasury (Vol. XXIII, p. 732, June 13, 1917), wherein the question considered was the charging of the account of the clerk of the United States District Court for the District of Massachusetts with interest received by him on deposits in banks of the earnings of his office, pending the making of his returns. Mainly on the authority of United States v. Hill, 120 U. S. 169, and 123 U. S. 681, and United States v. Mason, 218 U. S. 517, as well as on the authority of Judge Geiger's opinion (which opinion was based largely upon the cases cited), the Comptroller found that it "seems to be fairly well established that interest monies accruing on money collected by a clerk for official services rendered, and held by him pending his semiannual return do not constitute emoluments of the clerk's office to be accounted for to the United States," and he affirmed the prior decision of the department auditor, which was against the Government's contention.

The judgment of the district court is

AFFIRMED.

A true copy.
Teste:

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

45 District Court of the United States, Northern District of Illinois, Eastern Division.

U. S. v. Thomas C. MacMillan et al.—No. 10622.
U. S. v. Thomas C. MacMillan et al.—No. 10623.
U. S. v. Thomas C. MacMillan et al.—No. 10624.
U. S. v. Thomas C. MacMillan et al.—No. 10625.
U. S. v. Edward M. Holloway et al.—No. 10626.
U. S. v. Edward M. Holloway et al.—No. 10627.
U. S. v Edward M. Holloway et al.—No. 10628.
U. S. v. Marshall E. Sampsell et al.—No. 10629.
U. S. v. Marshall E. Sampsell et al.—No. 10630.

These nine actions in the form of debt, four of them against the present, two against a former clerk of this court, three against the clerk of the Circuit Court of Appeals, and each of their respective bondsmen, are brought by the Government upon alleged breaches of official bonds. The declarations aver such breaches to consist of

failures to account and pay over to the United States specified sums of money "derived from payments made to the respective clerks," for and on account of interest on public moneys intrusted to "said clerks in their respective official capacities as clerks," to wit:

(a) Moneys paid to the clerk as his fees under the bankruptcy laws of the United States, and

(b) Moneys paid to the clerk as his fees, and compensation as his emoluments as clerk under the various statutes of the United States, and

(c) Moneys deposited with the clerk by various litigants in said District Court under and by virtue of certain rules of said court, and

The aggregate sum of interest moneys default in whose payment to the Government is so averred is further characterized as having been "paid to him (the clerk) for the use of the said moneys collected and held by him as clerk as aforesaid under the laws of the United States," etc., and "the same is and was no part of any sum or sums earned by him * * * (the clerk) as such clerk, but was in fact and is the property of the United States."

46 To the several declarations pleas were interposed, each setting up, in brief:

That there came into the possession and custody of the defendant clerk, and was deposited by him in various banks while he was in such custody and possession, certain moneys, referred to as the aggregate principal, composed of and coming from various sources, viz:

"(a) Moneys paid to the clerk as clerk's fees and compensation, under the bankruptcy laws of the United States; and

"(b) Moneys paid to the clerk as his fees and compensation, and as his emoluments as clerk, under various other statutes of the United States; and

"(c) Moneys deposited with the clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

"That on the average balances of said 'aggregate principal' so remaining from day to day on deposit, the clerk received interest at the rate of two (2) per cent, said interest so received being the said * * * (sum) mentioned in the declaration, and no other.

"That as to the money included in items (a) and (b) and in that portion of item (c) which was, after its deposit, paid to the clerk as clerk's fees, emoluments or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund 'd') the clerk did on the first day of each January and July of each year, or within thirty days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semi-annual period, of all the fees and emoluments of his said office as clerk of said District Court, and included in the same

all of the moneys composing said items (a) and (b) and that portion of item (c) paid to the clerk as fund 'd.'

"That each of said returns included also a statement of the necessary expenses of said office during the same respective semi-annual period, including necessary clerk hire (and including his own compensation as allowed by law), and was accompanied by vouchers for and showing the payment of the same; that each said return particularly stated the amounts for the respective preceding half year of all fees and emoluments received, and of all of said necessary expenses paid out, which expenses were deducted on said state-
47 ment from the entire amount of all said fees and emoluments received; that the surplus money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to wit, on the same day, paid into the Treasury of the United States, or to the Subtreasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown and accounted for and paid was in each case reecived by the United States.

"And the said interest received by the clerk in each said semi-annual period earned and accrued as aforesaid upon said items (a) and (b), and upon that portion of item (c) above mentioned as fund 'd,' was so earned and accrued before, and not after, the said fees and emoluments composing the said items had been so included in and made the subject of said return and had formed the basis of the computation and ascertainment of said surplus."

The pleas (of the defendants, clerks of the District Court) further set out the court rules, which provide for the deposit by plaintiffs with the clerk of the sum of twenty-five dollars, to be applied to the payment of accruing costs; for the deposit by defendants appearing separately of the sum of five dollars for the payment of defendant's costs that may accrue; for the receipt by the clerk of moneys paid to be applied on judgments, subject to the clerk's right to take one per cent thereof as earnings of the office; for the accounting of interest on such latter sums upon motion of a party—no such interest to be accounted for without the order of the court; for the repayment to original depositors of unexpended balances remaining in the clerk's hands after expiration of a specified time. The pleas proceed:

"That said item (c) was composed entirely of money paid to the clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the clerk.

"To himself as fees or compensation allowed by law; and to the marshal and other court officers as their respective fees or compensation alowed by law; and to other persons and for other purposes connected with litigation as the same should be from time to time by said court directed.

"That all of the fees and emoluments earned by the clerk and to which he became entitled to be paid and which he was paid out of

said item (c) were by him included in and specified in his said respective semi-anual returns and reports as aforesaid.

48 "That that portion of the money composing said item 'c' which was composed of said fees and compensation of the marshal and other court officers, and said sums directed by the court to be paid to others, was all, by the clerk, paid to those court officers entitled to the same as and when the same was by such officer earned or was paid to such other person when and as the court directed the same to be paid to them, as the case might be, said portion being herein called and referred to as fund 'e.'

"That the money composing the residue of said item (c), other than fund 'd' and fund 'e,' was by the clerk paid out to the persons depositing the same, or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

"That of the said sum of money composing item (c) that portion earned by and paid to the clerk as fees and emoluments earned by him as clerk (being fund 'd') was in each case included in and settled for in the respective semi-annual returns as aforesaid."

The Government has demurred to each plea, and all of the cases are now before the court upon such demurrers.

GEIGER, *District Judge.*

From the declarations and pleas we may summarize that the funds, which we may term the "principal," received by the clerks and deposited in the banks and whereon the interest was earned, may be classified into (a) moneys deposited by litigants with the clerk subject to be disbursed to himself or to others as occasion may demand in the course of the litigation; (b) fees and emoluments earned by the clerk and paid to himself out of such last above specified deposits—and, as to such earned fees and emoluments, a semi-annual account was rendered, the account being charged to himself, and against the same was credited the office expense, the compensation retainable ($3,500.00 per annum), and the surplus remaining, which latter was always paid to the Government.

To put it in another way, the interest moneys in question arose from bank deposits which were constituted from two sources, first, moneys deposited by litigants who, until such moneys were actually covered into fees payable by them, retained the beneficial interest or ownership therein; and, secondly, the fees and emoluments before a surplus was ascertained and paid over.

What is the character or status, as between the Government,
49 the clerk, and the litigant, of the moneys received, upon which, when deposited in the banks, the interest moneys arose as stated. Are they public moneys whereof the clerk is trustee for the plaintiff Government? This is the fundamental question whose answer, if affirmative, will sustain, if negative, will overrule, the demurrers.

Exhaustive historical reviews of legislation respecting fees of clerks of the Federal courts, are found United States v. Hill, 120 U. S. 169; in United States v. Hill, 123 U. S. 681; United States v. Mason, 218 U. S. 517; and in considering the question now presented, no purpose will be served by repetition thereof. It will suffice to note that, prior to 1841, clerks were under no obligation to render any account of fees or emoluments to the Government. They retained all revenues so coming to their hands. But in that and subsequent years the legislation having the effect of limiting their earnings was inaugurated and continued. The cases cited, and others, deal with the intent embodied in such legislation, and, as will be seen, are persuasive in determining the status or character of the moneys or revenue which now, as prior to such legislation, came into clerks' hands in the discharge of official duties.

It will be assumed that the plaintiff seeks recovery of the interest money in its own right; that the failure to account for and pay it to the Government, is assigned as a breach by the respective clerks of an official obligation to be discharged by them to the plaintiff; that while, as seen from the statement of facts, the defendant clerks have assumed obligations toward litigants respecting the disbursement of deposited moneys and the return to such litigants of any unexpended portion, no breach of any such obligation is assigned as a basis for institution of suit by the Government on behalf of others; in other words, the plaintiff seeks recovery of the interest moneys "as the property of the United States." So too, it will be assumed that if the revenues coming to the hands of the clerks are in truth public moneys, the property of the Government, then any interest earned thereon, no matter when or how, rightfully follows the principal or corpus, as an incident or increment, in no event subject to personal appropriation by the custodian of the principal.

Considering first the interest money as arising upon a fund in part constituted from deposits made by litigants to be drawn against by the clerk for payment of fees as they accure, certainly neither the clerk nor the Government has any interest in such deposits, prior to proper appropriation for the uses intended, except to hold them Even admitting for the time being, that the fees when actually earned and paid are then public funds, the deposit made by a litigant to secure such payment, is in no proper sense a fund in or over which the Government has obtained the slightest proprietary interest or power of disposition. That interest and right is retained by the litigant, save only as he has surrendered it to the clerk to exercise by drawing against it in the defrayal of fees as and when, under the law, they accure and are chargeable against the litigant. While the transaction in making the deposit under the rule may not technically be a bailment, the clerk, in the nature of things, stands as a sort of insurer for the return to the litigant of the deposit or such part thereof as shall not have been earned as fees either by himself or others for whose benefit it is made. Certainly the deposit is not made

for the benefit of the Government. The clerk under the law is required to account for fee earned whether they are paid or not; and the rule does not impress such deposit with the character of public moneys or revenues; but is a mere regulation for the protection of the clerk, to guaranty to him in advance, and as an administrative convenience in the discharge of his duties of and in the payment of moneys primarily receivable by him as his compensation. As indicated, if these court rules for deposits were not in force, it would rest with the clerk to insist upon payment of each fee as it is earned, in advance. If he failed to collect, but accounted for it as earned, the loss is his. His failure actually to collect the money from the litigant, while it might so result in loss to him, would not, if he accounted for it to the Government, be a breach of any condition of his bond. So long, therefore, as the moneys deposited by the litigant retain their status as a security deposit, the Government has and can have no claim to any increment thereof by way of interest.

Coming now to the character or status of the other constituent of the fund upon which the interest money in question arose—the moneys earned by the clerk as official fees and emoluments and which, pending the semi-annual accounting and return were deposited in the banks. While it is true that in Bean v. Patterson, 110 U. S. 401, the Supreme Court upon an application for leave to docket an appeal, ruled that under an act substantially like that governing district court clerks, the clerk of the Supreme Court could demand payment of certain fees in advance; and declared that:

"As the law now stands the fees and emoluments of the
51 office (clerk of Supreme Court) belong to the Government subject only to the payment of the annual salary of the clerk, necessary clerk hire and incidental expenses, and the clerk is the collecting agent for the Government":

and while the Circuit Court of Appeals for the first circuit, in United States v. Mason, 129 Fed. Rep. 742, adopted this expression in considering certain items of a clerk's account as constituting a "necessary expense" of his office; nevertheless the question respecting the character or status of funds in the hands of a district court clerk prior to his semi-annual accounting, was directly presented in the recent case of United States v. Mason, 218 U. S. supra; and the ruling therein is, in my judgment, decisive of the present cases. It involved the validity of an indictment charging a clerk of a district court with embezzling funds in his hands; and required answer to the concrete question whether, before a surplus of moneys in the clerk's hands was ascertained and required to be paid over, the funds received by him were public moneys of the United States. A negative answer is given, based, as the court says, upon consideration of the "history of his (the clerk's) relation to these moneys and of the statutes which specifically define his rights and duties." Mr. Justice Hughes quotes the language found in United States v. Hill, supra:

"The clerk of a court of the United States collects his taxable 'compensation' not as the revenue of the United States, but as the fees

and emoluments of his office, with the obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law' properly so called, but out of a statute governing an officer of a court of the United States."

And proceeds:

"But, for the reasons we have stated, even the duty to pay the surplus shown by the return or audit is not governed by the statutes, relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the 'public money' or 'the money or property of the United States' within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount 52 payable when the return is made the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

This language, it seems to me, leaves nothing further to be considered except the suggestion made by plaintiff that the interest moneys, being received upon funds which came to and were in the clerk's hands by virtue of his office, should be considered and accounted for as emoluments. What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this—that the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official the rendition of the service, and the official has the right to exact the money return—under official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it in another way—the payment moves to the official in consideration of the rendition by him of some official act or service, the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.

Now, while it is true that the incumbency of the office of clerk by an individual, his receipt of moneys for fees, emoluments or deposits by litigants, and the deposit thereof by the clerk in banks, all concur in furnishing or creating the occasion through which he receives interest on the funds in the bank, yet he is not required, therefore cannot and does not deposit the funds in the bank upon an interest paying basis by virtue of his official obligation; nor can or does he exact the interest from the banks under the sanction of official right or duty. Therefore such interest is not and cannot be an emolument.

In this connection it is further urged by the Government that, until the semi-annual return is made, the moneys received by the clerk for fees, court costs etc. belong "to the office of the clerk and not

his individual property." It is not possible that the "office" of clerk can be treated as an entity, apart from the Government or the clerk, having a proprietary interest or title in or to the funds. If the contention be that because the moneys are paid to and received by the clerk by virtue of his office and not individually, therefore they are not his individual property, the reply is aptly stated by Mr. Justice Hughes in the Mason case:

53 "There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. The consideration however does not aid the prosecution for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty to account for them."

This last observation suggests the query if, prior to the passage of these statutes, the clerk had deposited in the bank all moneys received by him as clerk and had received interest on his daily credit balance, could it reasonably be claimed that such interest money was an emolument of his office? It is my judgment that whatever effect these various statutes may have, they do not have the effect of transforming into fees and emoluments, payments which, prior to their passage, were not fees and emoluments received for the discharge of official duties. They furnish no new tests for determining the character of funds received by the clerk. Nothing demonstrates this more clearly than United States v. Hill, supra, and the amendment to the statute which ensued the rendition of that decision. There, a clerk of the district court by direction of the judge, rendered services by way of assistance in naturalization proceedings—the preparation of cases for hearing, examination of witnesses and the like, for which he collected compensation from the applicants. It was sought to compel him to account for the moneys thus received; but as the duties were held not to pertain to the office of clerk, he was held not obliged to include them in his return. The law as subsequently enacted by Congress declared such compensation subject to be accounted for as other fees and emoluments—doubtless to avoid the effect of the ruling referred to.

The conclusion to be drawn from the Mason case would therefore appear to be: That the statutes which have been passed since 1841 do not abolish, but on the contrary were and are intended fully to recognize and continue in force the preexisting system of compensating clerks of courts by means of fees and emoluments collected from persons who as litigants or otherwise are recipients of their official services; that the fundamental purpose of these statutes is (1) to place a limitation upon the aggregate amount of compensation which may be received by clerks through such system; (2) to

54 impose upon the clerks the obligation to pay to the Governments—of which they are officials—the excess beyond such limitation; (3) to provide the manner and means, semiannually, of reduc-

ing such obligation to concrete terms, by requiring returns, accounting and the like, and (4) the manner and means of securing performance by the clerks of the statutory obligation to pay the excess, if and when ascertained. This conclusion, and no other, is reconcilable with the Supreme Court's view that the clerk is not a trustee but a debtor, of the Government. Of course when a clerk has breached his obligation with respect to holding and properly disbursing moneys deposited by litigants, the power of the Government as obligee in the bond given by the clerk, to sue on behalf of and vindicate the litigant's rights, cannot be denied. United States v. Abeel, 174 Fed. Rep. 12. That does not impress the amount sought to be recovered with the character of public revenues. The bond is given to secure the faithful discharge of the official's duties, whatever they may be and to whomever they may be owing; and the fact the Government is obligee therein is of no importance save as a participation by it to make secure and effective the "distinct system" of having the features noted, viz, compensation of the clerk, not out *out* of public revenues, but by fees from litigants, with the obligation on the clerk to pay to the Government the excess over a specified amount.

The conclusion is that the demurrers must be overruled, and orders may be entered accordingly, in each of the nine cases.

F. A. Geiger, *Judge.*

(Endorsed:) Filed November 18, 1913, at 8.40 o'clock a. m. T. C. MacMillan, clerk.

(Endorsed on cover:) File No. 26,647. U. S. Circuit Court Appeals, 7th Circuit. Term No. 561. The United States of America, plaintiff in error, vs. Thomas C. MacMillan and The Empire State Surety Company. Filed July 15, 1918. File No. 26,647.

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